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IN THE

Supreme Court of the United States

October Term, 1984

OCCIDENTAL OIL SHALE, INC.,

Petitioner,

v.

STATE BOARD OF LAND COMMISSIONERS OF COLORADO AND ITS MEMBERS, ROWENA ROGERS, JOHN S. WILKES, III AND TOMMY NEAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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April 15, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Supreme Court of Colorado correct in concluding that this Court's decision in *Andrus v. Utah*,[1] construing the Taylor Grazing Act,[2] repudiated its long-standing principle[3] that equitable title to the public lands vested immediately in the State upon the proper filing of its land selection and waiver of its rights in the original grant lands under the indemnity statutes?[4]

2. If so, should not this issue be reconsidered in view of the special facts[5] presented in this case?

3. Prior to any ruling by the Secretary of the Interior that the value of the indemnity lands selected by the State of Colorado greatly exceeds the value of its original grant, does not equitable title to indemnity lands pass to the State upon the proper filing of its selections?

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1 446 U.S. 500 (1980).

2 43 U.S.C. §§ 315, 315f (1982).

3 *Payne v. New Mexico*, 255 U.S. 367 (1921), and *Wyoming v. United States*, 255 U.S. 489 (1921).

4 43 U.S.C. §§ 851, 852 (1982).

5 Among these is the fact that this case was tried on a stipulation entered into between the parties more than a year after *Andrus* was decided, which conceded that upon the filing of selections "there was vested in the State the full equitable title to and interest in the lands selected." Although this stipulation had been approved by the Colorado District Court and was relied upon by that court in rendering its decision in Petitioner's favor, nevertheless, on further appeal to the Colorado Supreme Court the Respondents withdrew the stipulation during oral argument. Second, after Petitioner's application for an oil shale exploration permit was filed, Colorado amended its mineral location statute to exclude any such applications for oil shale, thereby forfeiting Petitioner's prior discovery rights unless this Court now grants the relief requested. Third, despite the fact that tens of thousands of acres of oil shale lands are located in the State of Colorado, Colorado received no such lands because, at the time of its admission to the Union, all such land was located within a subsequently extinguished Ute Indian Reservation. This is in stark contrast to the Utah school land grant, where the State did in fact receive a cross section of the oil shale lands within its boundaries.

4. Was the Colorado Supreme Court wrong in holding that, until the Secretary of the Interior has approved Colorado's land selections, the State has neither equitable nor legal title but "only an incipient prospect of future ownership of the selected lands"?[6]

5. Should not the Taylor Grazing Act[7] be made consonant with the statutes providing for indemnity lands[8] so that equitable title immediately vests in the State unless and until the selections are rejected by the Secretary of the Interior in the proper exercise of his discretion?[9]

PARTIES TO THE PROCEEDING

(1) Occidental Oil Shale, Inc., a California corporation ("Occidental"); (2) the State Board of Land Commissioners of Colorado, an agency created by the Colorado Constitution ("Board" or "State Board"); and (3) the following three persons who are members of the Board above described: (a) Rowena Rogers, (b) John S. Wilkes, III,[10] and (c) Tommy Neal. The following are parents or affiliates (with publicly traded stock) of Occidental Oil Shale, Inc.: Occidental Petroleum Corporation, Canadian Occidental Petroleum Ltd., The Southland Corporation, Occidental International Exploration and Production Company, Occidental Oil and Gas Corporation and Occidental Petroleum Investment Company.

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6 *Occidental Oil Shale, Inc. v. State Board of Land Commissioners of Colorado,* 692 P.2d 321, 324 (Colo. 1984).

7 43 U.S.C. §§ 315, 315f (1982).

8 43 U.S.C. §§ 851, 852 (1982).

9 In this case there is no dispute that the Secretary of the Interior has neither approved nor disapproved the Colorado land selection even though almost six years have passed since it was filed. During this time, Colorado has enjoyed no beneficial use of the selected lands.

10 Pursuant to United States Supreme Court Rule 40, Occidental substitutes and names John S. Wilkes, III, the successor to one of the original defendants, William H. Claire, as a member of the State Board of Land Commissioners of Colorado.

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PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Petitioner Occidental Oil Shale, Inc. prays that a writ of certiorari issue to review the judgment and opinion of the Colorado Supreme Court entered in this proceeding on December 10, 1984.

OPINIONS IN THE COURTS BELOW

On May 14, 1982, the District Court for the City and County of Denver issued an unreported decision reversing an administrative decision of Respondent State Board of Land Commissioners. See Appendix C. The administrative decision of Respondent State Board is set forth in letters dated October 16 and October 22, 1979, copies of which are reproduced in Appendix E. On December 10, 1984, the Colorado Supreme Court reversed the decision of the Denver District Court. See Appendix A. The Colorado Supreme Court decision is reported at 692 P.2d 321 (Colo. 1984), *Occidental Oil Shale, Inc. v. State Board of Land Commissioners of Colorado ("Occidental v. State Board").*

JURISDICTION

The final judgment of the Colorado Supreme Court was entered on December 10, 1984. Occidental's petition for rehearing was denied by that Court on January 14, 1985. See Appendix B. Jurisdiction of this Court to review the decision of the Colorado Supreme Court is conferred by 28 U.S.C. § 1257(3) (1982).

STATUTORY PROVISIONS

Statutes involved are the Act of March 3, 1875, § 7, 18 Stat. 474 (the Colorado Enabling Act); 43 U.S.C. §§ 851, 852 (1982) (statutes providing for indemnification of public land states); 43 U.S.C. §§ 315 and 315f (1982) (Sections 1 and 7, respectively, of the Taylor Grazing Act); and Colo. Rev. Stat. § 36-1-140 (1973) (Colorado's Mineral Location Law). The relevant text of these statutes is reproduced in Appendix F.

STATEMENT OF THE CASE

Federal Grant of School Lands. As a matter of early policy, Congress made grants of federal land to each state entering into the Union after 1802. Among the purposes for such grants was the support of public schools. As consideration for these federal grants, the public land states agreed (i) not to tax the federal land within the state, and, (ii) to commit the resources granted to the support of public schools. Accordingly, Colorado was granted over 4,000,000 acres of federal land in 1876 upon statehood. Colorado was granted Sections 16 and 36 of each township in Colorado for the support of its schools. In Colorado, as with other public land states, title to the granted school lands did not pass immediately, but rather remained in the federal government until after the official land surveys had been completed.

As was true in other public land states, the surveys which would identify, among other things, Sections 16 and 36 were not

completed until many years after statehood. However, in the meantime, other methods of gaining property interests in or title to federal lands (such as mineral locations or homesteads) or reservations of the public domain by the Federal Government (such as the creation of National forests or Indian reservations) were not held in abeyance pending survey. Consequently, in numerous instances the school lands granted to Colorado (Sections 16 and 36) were in fact unavailable at the time of survey due to prior federal commitments or withdrawals. Therefore, pursuant to Section 7 of the Colorado Enabling Act and the federal laws regarding land grants and indemnification, Colorado was required to waive its rights to those lands which had been granted to Colorado but which had been sold or otherwise disposed of by the United States, before Colorado could select, in lieu thereof, other available federal lands known as "indemnity lands." This indemnification procedure insured that Colorado, as well as the other public land states, would receive the full benefit of their bargain with the Federal Government. For more than a century, the indemnity process has been in operation.[11] To ensure that the indemnity privilege is lawfully exercised, the selections are subject to review and approval by the Secretary of the Interior. The Secretary's approval of a selection is referred to as the "clearlisting" of a selection. The indemnification statutes are currently codified at 43 U.S.C. §§ 851, 852 (1982).

Colorado's Indemnity Selection. Following numerous indemnity selections over the years, in September of 1979 the State of Colorado (acting through the Respondent State Board) submitted a list of certain lands to the Bureau of Land Management for approval by the Secretary of the Interior. This list identified 6,840 acres of oil shale land ("Selected Lands") selected by Colorado as indemnity for certain school lands granted to

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[11] Arizona, California, Colorado, Idaho, Montana and Wyoming currently have remaining indemnity selection entitlements. Oregon and the United States are presently involved in a dispute as to whether Oregon has an additional indemnity entitlement. Utah has pending selections which concern all of its remaining indemnity acreage. See map on page 17 of this Petition.

Colorado but which had been sold or otherwise disposed of pursuant to other Acts of Congress. Colorado's selection complied with 43 U.S.C. §§ 851, 852 in all respects. In its selection, Colorado certified that it was selecting mineral lands in accordance with 43 U.S.C. § 852(a)(1) because the original grant lands (base lands) supporting the selection were mineral in character. Although this selection has been pending for almost six years, as of the date of this petition the Secretary of the Interior has neither approved nor disapproved it.

Occidental Properly Located and Filed Its Mining Claims With Colorado. At the time of the Colorado selection, Occidental was active in oil shale development and had pioneered the modified *in situ* process for the recovery of shale oil. Because Occidental was interested in leasing the oil shale lands selected by Colorado, Occidental located mineral claims on such lands pursuant to Colorado's Mineral Location Law, Colo. Rev. Stat. § 36-1-140 (1973). Appendix F contains a copy of that statute. It provides that Colorado mineral locators may receive a priority right to explore and subsequently lease mineral lands belonging to the State by locating mineral claims and notifying the State Board of the locators' intent to explore and lease the mineral lands upon which the claims were located. Under this Colorado statute, mineral locators first receive an exploration permit and, ultimately, a state lease.

Respondents Erroneously Asserted Legal Title Was Necessary and Rejected Occidental's Application. Although the Board admitted in administrative hearings that Colorado had equitable title to the Selected Lands, it denied Occidental's request for an exploration permit on the ground that the State did not yet have legal title to the Selected Lands. Occidental agreed that Colorado did not yet have legal title to the Selected Lands. However, Occidental brought to the attention of the Board this Court's decision in *Wyoming v. United States,* 255 U.S. 489 (1921) (*"Wyoming"*), and advised the Board that the *Wyoming* decision clearly demonstrated that public land states may make commitments with regard to selected lands prior to obtaining

legal title thereto. The practice of public land states for more than a century had been to grant rights in selected but not yet clearlisted lands, subject to the possibility of defeasance if the selection were not approved by the Secretary of the Interior. Indeed, some states made selections based upon rights previously granted to private parties. *See Calif. ex rel. Hastings v. Jackson,* 112 U.S. 233 (1884). Although admitting that Colorado held equitable title, the Board nevertheless refused to grant Occidental's exploration permit, contending that no commitments could be made with respect to the Selected Lands absent legal title. No authority was cited in support of the Board's decision, and it was contrary to the decisions of this Court in *Wyoming* and *Payne v. New Mexico,* 255 U.S. 367 (1921) (*"Payne"*). By letters dated October 16 and 22, 1979, the Board notified Occidental of its decision. See Appendix E.

Colorado Conceded in a Formal Stipulation That It Had Equitable Title. Occidental timely appealed the Board's decision to the District Court for the City and County of Denver. This Court's decision in *Andrus v. Utah,* 446 U.S. 500 (*"Andrus"*), was issued in May of 1980. Approximately 16 months after *Andrus* was announced, with the express approval of the Denver District Court, Petitioner and Respondents agreed to clearly define the controverted legal issue, and stipulated that the court:

> will decide whether the subject [Selected] lands belong to the state under 1973 C.R.S. 36-1-140 on the basis of the following facts:
>
> a. Upon the filing of the State Board of Land Commissioners' selection application with the Bureau of Land Management on September 4, 1979, there was vested in the State the full equitable title to and interest in the lands selected.
>
> b. Legal title to the lands will not vest in the State until the lands are clear-listed by the Secretary of the Interior.

The stipulation of the parties and court order dated September 14, 1981 is attached hereto as Appendix D. After briefing and argument, the District Court entered its judgment (Appendix C) concluding that the Selected Lands did belong to Colorado and were within the scope of the Colorado Mineral Location statute, Colo. Rev. Stat. § 36-1-140 (1973). The District Court concluded that the Board erred in denying Occidental's request for an exploration permit. The District Court held that, when the Board submitted the selection documents to the Bureau of Land Management, Colorado acquired equitable title to and interest in the Selected Lands and that Colorado had acquired such an interest in the Selected Lands so as to open such lands to mineral claim locations under Colo. Rev. Stat. § 36-1-140 (1973). In so holding, the District Court expressly relied upon this Court's decisions in *Wyoming* and *Payne*. Respondents subsequently appealed the decision of the Denver District Court to the Colorado Supreme Court.

Colorado Repudiated Its Own Stipulation. On appeal, the Colorado Supreme Court was called upon to determine whether the State of Colorado could make commitments with regard to selected, but not yet clearlisted, indemnity lands. As in the District Court below, the case was briefed before the Colorado Supreme Court on the basis of the stipulation of the parties, as approved by the District Court, that Colorado had full equitable title and interest to the Selected Lands. However, during oral argument and in response to questions propounded by the Colorado Supreme Court, the Colorado Attorney General stated that the State had reconsidered and changed its position with regard to the possession of equitable title — concluding and announcing that, in the Attorney General's opinion, Colorado did not have equitable title to the Selected Lands by reason of this Court's decision in *Andrus*.

Colorado Supreme Court Erroneously Concluded That This Court Had "Undermined" Its Prior Decisions. The Colorado Supreme Court ruled that equitable title to selected lands no longer passes to a public land state upon selection

because of that court's interpretation of *Andrus.* Relying upon such an erroneous interpretation of *Andrus,* the Colorado Court asserted that the "foundation . . . for the conclusion that the state has an equitable interest in selected lands," as stated in *Wyoming,* had been "undermined" by the legislation and executive action described in *Andrus. Occidental v. State Board,* 692 P.2d at 324. The Colorado Supreme Court went on to say that the Secretary of the Interior had such broad discretion to determine whether to approve indemnity selections that the Secretary was no longer "restricted to 'determining whether an existing privilege conferred by Congress had been lawfully exercised'." *Id.* Consequently, that Court concluded that a selecting state has "only an incipient prospect of future ownership of the selected lands . . . " and that "a state now obtains no assurance that it will receive all or any selected indemnity lands until . . . classification." 692 P.2d at 324, 325. In response to such ruling and after a denial of its petition for rehearing, Occidental has timely filed this petition.

REASONS FOR GRANTING THE WRIT

The essence of this petition is that the Court's decision in *Andrus* has been misinterpreted and broadened beyond the intention of this Court, majority and minority. *Andrus* clearly held that an indemnity selection is the exercise of a "right" obtained under a "solemn agreement" among the public land states and the United States. Neither the majority nor, of course, the minority intended to indirectly repeal the indemnity land statutes, or its long established principles announced by this Court in the *Payne* and *Wyoming* cases.

The principle that equitable title vests upon the proper filing of a selection was established more than sixty years ago in *Payne* and *Wyoming.* However, the Colorado Supreme Court has misapplied the decision in *Andrus* by concluding equitable title no longer vests and that indemnity selections are merely proposals to be considered by the Secretary of the Interior, rather than the exercise of a right founded in the solemn indemnity

compact among the United States and the public land states. Without certiorari review by this Court, public land states will be deprived of such rights by virtue of an erroneous interpretation of *Andrus.*

ARGUMENT

1. The Colorado Supreme Court misapplied the *Andrus* decision by concluding that equitable title did not vest in Colorado upon the proper filing of its indemnity selection.

A. *Andrus* determined that, under the Taylor Grazing Act, selected lands must be classified as proper for acquisition; it did not hold that equitable title no longer vests upon selection.

In the 5-4 decision in *Andrus,* this Court held that Sections 1 and 7 of the Taylor Grazing Act, 43 U.S.C. §§ 315, 315f, permit the Secretary of the Interior, in his discretion, to classify public lands as proper for acquisition through indemnity selection. 446 U.S. at 520. In exercising such discretion, *Andrus* held that the Secretary of the Interior may refuse to accept an indemnity selection when there is a gross disparity between the value of the original grant and the selected indemnity land. 446 U.S. at 501. *Andrus* made it clear that selecting states do not have an absolute right to select tracts of land of an equal acreage to the original grant. But *Andrus* did not overturn the long-standing principle that equitable title vests immediately upon the proper filing of an indemnity selection, as was announced by this Court in *Payne* and *Wyoming.* The vesting of equitable title is an element of the long-standing, bilateral compact among the United States and the public land states, and is the quid pro quo for the states' waiver of their rights to the original grant lands when making a selection.

Andrus is consistent with the precedent of *Payne* and *Wyoming* regarding the vesting of title. In *Payne,* Secretary of the Interior Payne contended that, because the selections were

subject to his approval, "no right can become vested, nor equitable title be acquired, . . . unless and until his approval is had." This Court rejected that contention on the ground that, once a selection has been made, the Secretary's "duty" is that necessary " 'to determine the lawfulness of the selection as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections'." 255 U.S. at 371. Similarly, in *Wyoming,* this Court reviewed an indemnity land selection made by Wyoming "under the direction of the Secretary of the Interior" and concluded that the power confided to the Secretary was "not that of granting or denying a privilege to the state, but of determining whether an existing privilege conferred by Congress had been lawfully exercised . . . ." 255 U.S. at 494, 496-97. This Court further concluded that a properly filed selection is the equivalent of a cash entry of the selected land and conveys equitable title, subject to the approval of the Secretary of the Interior as above described. Such title vested immediately, notwithstanding the fact that the Secretary might subsequently reject the selection. Legal title did not vest until the Secretary approved the selection. Though subject to the Secretary's review, the Secretary may not defeat a selection by arbitrarily withholding approval, nor may he do so through a mistake of law which would otherwise leave the selector "remediless." *Wyoming,* 255 U.S. at 505. In *Wyoming* and *Payne,* equitable title had vested upon selection and this Court set aside erroneous legal conclusions of the Secretary so that legal title to the selected lands would pass to Wyoming and New Mexico, respectively.

In *Andrus,* this Court was called upon to determine whether the Secretary of the Interior could reject certain indemnity selections because the selected lands had not been classified as proper for acquisition by the States. Utah did not bring the *Andrus* litigation to confirm its equitable title to the selected land; the action was brought to compel the Secretary to approve the selections so that legal title would pass to Utah. However, the Secretary refused to approve the selections because of a gross disparity between the values of the selected and grant lands. The Secretary's refusal to approve the selections was upheld, and legal title did not pass to Utah.

B. The Colorado Court erroneously assumed that equitable title did not vest when Colorado made its indemnity selection because of the possibility that Colorado's selection subsequently might be rejected.

The Colorado Supreme Court improperly broadened this Court's ruling in *Andrus* by assuming that, because the Secretary was entitled to classify lands as being proper for acquisition through selection, no rights in these selected lands vest "until" classification. Said the Colorado Supreme Court in this case: "Until that decision [land classification] has been made, the state has only an incipient prospect of future ownership of the selected lands . . . . " 692 P.2d at 324, 325. But this conclusion misinterprets *Andrus.* The effect of the Colorado decision is to elevate the Secretary's discretionary authority above the Congressional grant of indemnity rights given at statehood. Under the Colorado Court's interpretation of *Andrus,* the Secretary's exercise of discretion *is* the grant of rights to Colorado. That interpretation is inconsistent with the decisions of this Court in *Payne, Wyoming* and *Andrus,* which state that the Secretary does not grant rights, but rather determines whether the rights granted by Congress have been lawfully exercised. In each of those three cases: (i) equitable title had vested in the selecting state; and, (ii) the Secretary had refused to approve the selection, thereby preventing legal title from passing to the state. In *Payne* and *Wyoming,* this Court determined that the Secretary erred as a matter of law in withholding legal title. In *Andrus,* this Court upheld the Secretary's decision, so that legal title to the selected lands was denied, and the equitable title which had vested was defeated. The error of the Colorado Supreme Court was to erroneously extend *Andrus* by assuming that, because equitable title might be subsequently defeated, such title did not vest in the first instance when the selection was filed.

The prompt vesting of equitable title in selected lands upon selection is neither inconsistent with this Court's decision in *Andrus* nor the rights of the United States. Indemnity selections by the public land states have always been subject to the possi-

bility of defeasance in the event that the right was not properly exercised. Selections might be defeated because the selected lands may have been subject to prior commitments or claims, the selected lands may have been determined to be mineral (prior to 1958), or where the value of the selected lands greatly exceeds the value of the base lands, as in *Andrus*. Nevertheless, the possibility of subsequent defeasance has not previously, nor should it now, serve to block the vesting of equitable title upon selection.[12]

Equitable title vests upon selection because the Congressional proposal requires the payment of the purchase price for the selected lands *upon selection* — such payment is effected by the waiver and relinquishment of the state's rights in the original grant. Although the details of the indemnification process have been modified numerous times in the last century, the requirement that the selecting state relinquish its rights to the lands granted simultaneously with filing the selection has remained unchanged. Consequently, the doctrine of equitable title in selected lands, first announced in *Payne* and *Wyoming*, also remains unchanged and continues to be part of the bilateral compact providing for indemnification. The Secretary's authority under the Taylor Grazing Act to reject the selection by determining that the selected lands were not proper for selection does not serve to nullify the grant, nor does it serve to block the vesting of equitable title. The Colorado Supreme Court has distorted this Court's holding in *Andrus* and misapplied such decision by concluding that, prior to a classification decision by the Secretary, a selection is no more than a mere proposal.

C. The Colorado Court's holding is inconsistent with the existence of the solemn indemnity agreement recognized in *Andrus*.

This Court has confirmed the existence of a contract among the United States and the public land states providing for

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[12] The vesting of equitable title is fully consistent with the long-established doctrine of equitable conversion.

indemnity in instances where school lands had been sold or otherwise disposed of by the United States. The right to select indemnity lands was determined to be a "privilege conferred by Congress,"[13] granted so as to insure that the public land states did, in fact, receive a random cross section of the public lands within the state.

The existence of this solemn indemnity agreement was most recently restated in this Court's decision in *Andrus,* wherein it was held that:

> [T]he school land grant was a "solemn agreement" which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.
>
> The State's *right* to select indemnity lands may be viewed as the remedy stipulated by the parties for the Federal Government's failure to perform entirely its promise to grant the specific numbered sections.

446 U.S. 508, 509 (emphasis added).

The Colorado Supreme Court's interpretation of this passage distorts it and is entirely unwarranted. The Colorado Court's decision that equitable title does not vest upon selection wholly ignores the existence of the solemn indemnity agreement described in *Payne* and *Wyoming* and confirmed in *Andrus*. The Colorado Supreme Court misapprehends the holding of *Andrus* and conflicts with this Court's confirmation that a selection is the exercise of a "right" under a solemn agreement with the United States. 446 U.S. at 506.

That the indemnification grant is part of a solemn compact is confirmed by Instructional Memorandum No. 82-33 promulgated by the Department of the Interior, Bureau of Land

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[13] *Wyoming,* 255 U.S. at 496.

Management in response to the *Andrus* decision. Such memorandum demonstrates that the Bureau of Land Management understands that the indemnity entitlement is "an obligation and debt due the States by the Federal Government," that the satisfaction of such obligation should be "considered as serving the national interest," and that selections should be processed to the greatest extent possible giving consideration to the equities of the public land states. (See pages 1 and 2 of Bureau of Land Management Instructional Memorandum No. 82-33, Appendix G.)

D. The Utah Supreme Court also erroneously broadened this Court's holding in *Andrus*.

The misapplication of *Andrus* is not limited to Colorado. The Supreme Court of Utah in *Justheim v. Division of State Lands*, 659 P.2d. 1075 (Utah 1983) (*"Justheim"*), also relying substantially on this Court's decision in *Andrus*, upheld a trial court decision determining that, notwithstanding Utah's filing of selection documents, "the State of Utah has not yet acquired *any* property interest by virtue of the pending school indemnity selection applications . . . ." 659 P.2d at 1077 (emphasis added). The Colorado Supreme Court relied upon *Justheim* in its decision in this action. 692 P.2d at 325. Thus, the highest courts of both Colorado (in this case) and Utah (in *Justheim*) have erroneously concluded that, contrary to this Court's prior decisions, public land states no longer receive equitable title to selected lands when a selection is made.

E. The *Andrus* holding may not be mechanically applied to Colorado's selection because there are substantial factual distinctions.

This Court's holding in *Andrus* regarding grossly disparate values between the granted and selected lands should not have been mechanically applied by the Colorado Supreme Court to this case. There are important distinctions between the Utah selection described in *Andrus* and the Colorado selection currently awaiting the Secretary's approval. The Secretary of the

Interior *has not* rejected Colorado's selection, nor has it been determined that the value of Colorado's selection greatly exceeds the value of the lands originally granted. Colorado's selection is substantially smaller than the multiple selections at issue in *Andrus*. The oil shale lands selected by Colorado are not presently leased by the Department of the Interior, unlike the circumstances in *Andrus* where the federal government leased some of the selected lands and deposited over $48,000,000 of lease payments in the District Court. Moreover, Utah generally received a random cross section of the public lands within that State, including oil shale lands. Colorado, however, received no oil shale land in the original grant because a vast part of western Colorado was occupied by the subsequently extinguished Ute Indian Reservation.

2. This Court should review state court decisions, such as this, which are based upon substantial misinterpretations of federal law.

Both the Supreme Courts of Colorado (in this case) and Utah (in *Justheim*) have based their decisions that selecting states no longer obtain equitable title on their understanding that *Andrus* compelled such a conclusion. It is well established that this Court has the jurisdiction and authority to review state court interpretations of state laws which have been reached under erroneous interpretations of federal law. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 104 S. Ct. 2267 (1984), and cases cited therein. The Court should grant certiorari in this case so that the judgment below may be vacated, permitting questions of state law to be reconsidered free from the misunderstandings as to the nature of the indemnity rights provided by Congress.

This Court has already recognized the importance of this issue, noting that school land indemnification is "a significant issue regarding the disposition of vast amounts of public lands . . ." *Andrus*, 446 U.S. at 506. Consequently, in *Andrus*, this Court granted certiorari in order to clarify the rights of the parties to the indemnification agreement. However, the granting

of certiorari and subsequent review by this Court in *Andrus* is now frustrated by the misapplication of that decision by the Supreme Courts of Colorado and Utah. As the federal indemnity statutes have not been clarified or modified subsequent to *Andrus*, this substantial and important federal issue remains to be clarified by this Court.

3. Without certiorari review by this Court, public land states will be deprived of their rights under the indemnity agreement with the United States because of a false interpretation of *Andrus*.

The misapplication of this Court's decision in *Andrus* has had, and continues to have, grave consequences for public land states seeking indemnification. Although most of the indemnity lands originally due to the states have already been selected, the states judiciously select lands of high value and importance as they exhaust their indemnity entitlement. Therefore, contemporary selections may involve mineral lands of significant value, or undeveloped lands with high potential for urban development. Yet, based on a misapprehension of this Court's decision in *Andrus*, these public land states now enter into indemnity negotiations with the Secretary of the Interior with the erroneous understanding that their selections are mere proposals, rather than a privilege and entitlement intended by Congress. The effect is to nullify the Congressional grant of indemnity. The uncertainty of public land states as to their rights post-*Andrus* was demonstrated in this case when the Colorado Attorney General stipulated to the possession of equitable title, briefed the Colorado Supreme Court that "the state acquired an equitable interest in the land upon its selection,"[14] but backed away from the stipulation during oral argument, based upon the Attorney General's rereading of *Andrus*.

The rights which are diminished are not merely the rights of the public land states, or the state agencies which oversee the

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[14] Respondents' "Opening Brief" to the Colorado Supreme Court filed February 28, 1983, at page 7.

state school lands. The beneficiaries of the school land and indemnification grants are the citizens of the public land states, who benefit from the sale, lease or other disposition of the state school lands. And it is these citizens who are injured by the misunderstanding of *Andrus* given by state agencies or attorneys general, and by the misapplication of *Andrus* by the courts of the public land states.

Six public land states have yet to exhaust their indemnity entitlement.[15] The map on page 17 identifies the states which have not yet completed their indemnity selections. Tens of thousands of acres have yet to be selected. At the time of filing this petition, there are several selections before the Secretary of the Interior for approval. This process should not be permitted to proceed further without clarification as to the nature of the contract rights of these states, and confirmation that equitable title to selected lands vests upon compliance with 43 U.S.C. §§ 851, 852 (1982). The guidance of this Court is needed to protect the rights of the public land states, and to ensure that this Court's decision in *Andrus* is logically applied and placed in the proper context of prior precedent.

Although this petition is filed on behalf of a private company, it involves the rights of all states which joined the Union after 1802. The compacts made between these states and the United States government have been abrogated by a misinterpretation of this honorable Court's decision so as to deprive the states of their rights. Thus, a profound public policy preserving the valuable rights granted to the states is involved in the instant petition.

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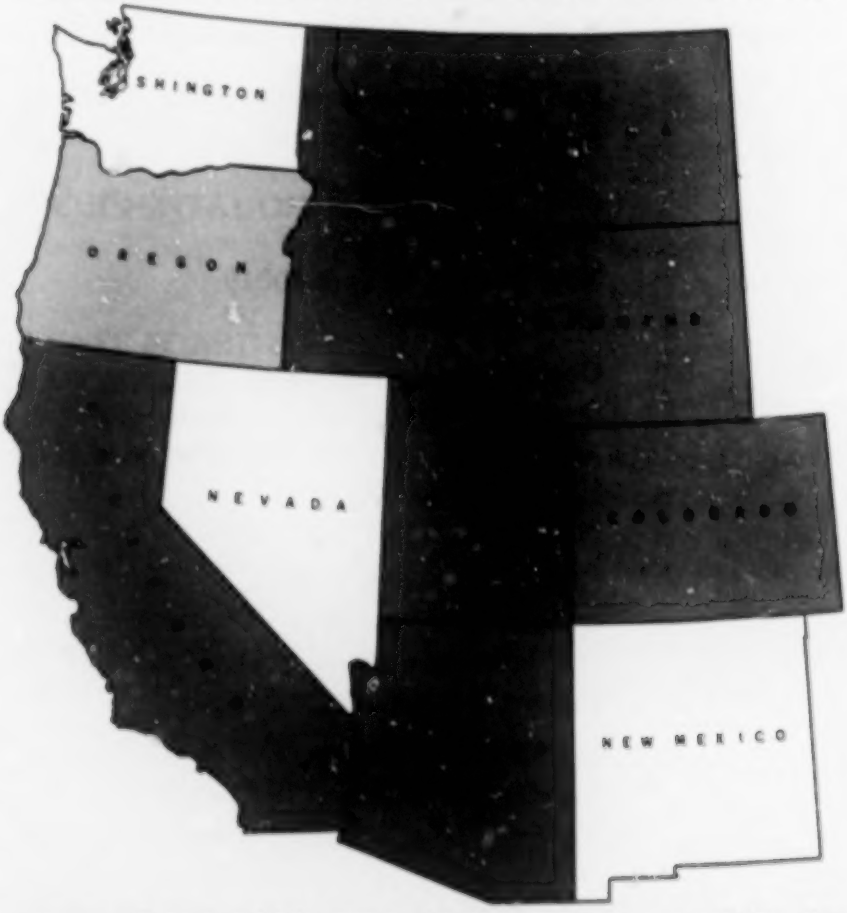
[15] Arizona, California, Colorado, Idaho, Montana and Wyoming.

PUBLIC LAND STATES:
CURRENT STATUS OF INDEMNITY SELECTIONS



States which currently have acreage available for indemnity selection: Arizona, California, Colorado, Idaho, Montana and Wyoming.

Oregon and the United States are currently involved in a dispute regarding whether Oregon has "overdrawn" its indemnity acreage or whether it is entitled to select additional lands.

An application covering virtually all of Utah's indemnity acreage entitlement is currently pending; following completion of that selection, it is possible that Utah may still have some indemnity acreage available for selection.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Colorado Supreme Court.

Phillips, Nizer, Benjamin, Krim & Ballon

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Counsel for Petitioner
Occidental Oil Shale, Inc.

April 15, 1985

APPENDIX A

IN THE SUPREME COURT, STATE OF COLORADO
CASE NO. 82SA455

December 10, 1984
Rehearing Denied January 14, 1985

OCCIDENTAL OIL SHALE, INC.,
Plaintiff-Appellee,

v.

STATE BOARD OF LAND
COMMISSIONERS OF COLORADO;
and its members, ROWENA ROGERS,
WILLIAM H. CLAIRE and TOMMY NEAL,
Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Hon. Robert T. Kingsley, Judge

EN BANC JUDGMENT REVERSED AND CAUSE REMANDED

Daniel R. Hale
Grand Junction, Colorado

Davis, Graham & Stubbs
Robert H. Harry
Joseph P. McMahon, Jr.
Denver, Colorado

Attorneys for Plaintiff-Appellee

Duane Woodard, Attorney General
Charles B. Howe, Deputy Attorney General
Richard H. Forman, Solicitor General
Melinda Kassen, Assistant Attorney General
Janet L. Miller, Deputy Attorney General
Denver, Colorado

Attorneys for Defendants-Appellants

JUSTICE LOHR delivered the Opinion of the Court.

The District Court for the City and County of Denver set aside a decision of the State Board of Land Commissioners (board) denying an application by Occidental Oil Shale, Inc. (Occidental) for a permit to explore the extent of an alleged discovery of oil shale deposits on certain lands. The district court disagreed with the board's conclusion that the lands in question were not "lands belonging to the state" under section 36-1-140, 15 C.R.S. (1973), and thus were not subject to the exploration permit provisions of the statute.[1] The board appealed from the district court's judgment.[2] We agree with the board that the lands do not belong to the state within the meaning of section 36-1-140. Therefore, we reverse the judgment of the district court and remand the case to that court with directions that it reinstate the board's decision.

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1 The version of section 36-1-140, 15 C.R.S. (1973), in effect at the time of Occidental's application provided:

> Location of mineral claims may be made upon unleased mineral lands belonging to the state. The discoverer of a body of mineral in either a lead, lode, ledge, deposit, vein, or contact shall immediately post conspicuously a notice declaring that he has made such a discovery on the date attached to the notice. Within ten days after posting said notice, the discoverer must notify the state board of land commissioners of said discovery and arrange for a permit to explore the extent of the discovery. Within sixty days from the date of discovery, the locator shall be required to take a lease upon such terms as may be agreed upon by the state board of land commissioners, or apply for an extension of the permit.

In its present form, this statute expressly excludes coal and oil shale claims from its terms. § 36-1-140, 15 C.R.S. (1984 Supp.).

2 The board appealed the judgment of the district court to the Colorado Court of Appeals. We accepted jurisdiction pursuant to section 13-4-110(1)(a), 6 C.R.S. (1973), because of a possible issue concerning the constitutionality of section 36-1-140, 15 C.R.S. (1973). More precisely, Occidental filed a motion to transfer this matter from the court of appeals to this court on the grounds that the board argued below, and might argue on appeal, that the construction of section 36-1-140 adopted by the district court conflicts with the board's constitutional duty to maximize revenue in its management of the state's land. Colo. Const. art. IX § 10. Jurisdiction to determine cases in which the constitutionality of a statute is in question is withheld from the court of appeals by section 13-4-102(1)(b), 6 C.R.S. (1973). The basis on which we resolve this appeal obviates the need to address the constitutional issue.

I.

Sections 16 and 36 in every township were granted to Colorado by the United States Congress for the support of common schools by section 7 of the Colorado Enabling Act.[3] Section 7 also provided that, where such sections had been sold or otherwise disposed of by an act of Congress, the state should receive "other lands equivalent thereto." Congress also enacted certain statutes of general applicability providing the mechanism by which the states could select indemnity lands in lieu of any original school grant lands that had been disposed of or otherwise proved unavailable for any of a number of reasons detailed in the statutes. These statutes are codified in their present form at 43 U.S.C. §§ 851-852 (1982).

Federal lands containing known mineral resources could not be selected by the states as indemnity lands prior to 1958. In that year, Congress extended the indemnity grant to include the right to select mineral lands to the extent the indemnification was sought for lost mineral lands. Pub.L. No. 85-771, § 2, 72 Stat. 928, 928 (1958).

On September 4, 1979, the board, acting on behalf of the State of Colorado,[4] submitted a list to the Bureau of Land Management, United States Department of the Interior, selecting 6,840 acres of oil shale lands in Rio Blanco County in lieu of certain designated school lands that had proved unavailable for disposition by the United States. *See* § 7, Colorado Enabling Act.

On September 24, 1979, Occidental notified the board that Occidental had discovered oil shale on the selected lands and that it had located mineral claims on all of those lands based on that discovery. Pursuant to section 36-1-140, Occidental requested a permit from the board to explore the extent of the discovery and stated to the board that Occidental "stands ready to take a lease

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[3] The Colorado Enabling Act was passed by Congress on March 3, 1875. 18 Stat. 474.

[4] The State Board of Land Commissioners asserts authority to select indemnity lands on behalf of the State of Colorado pursuant to article IX, section 10 of the Colorado Constitution and section 36-1-205, 15 C.R.S. (1973).

or apply for an extension of the above requested permit to further explore such lands."

On October 15, 1979, the board denied Occidental's application for an exploration permit. The board concluded that the lands in question would not belong to the state for the purposes of a mineral claim location pursuant to section 36-1-140 until the Secretary of the Interior approved the state's selection and legal titie passed to the state.[5]

Occidental brought an action in the district court for judicial review of the board's denial pursuant to section 24-4-106, 10 C.R.S. (1982). The district court set aside the board's decision to deny Occidental an exploration permit. The court concluded that, by identification and selection of indemnity lands in documents submitted to the Bureau of Land Management, Colorado acquired a sufficient interest in the selected lands so that these properties constituted "lands belonging to the state" upon which valid mineral claims could be located pursuant to section 36-1-140. The matter was remanded by the district court to the board for further proceedings on Occidental's application. The board then brought this appeal.

II.

When Occidental submitted its application for an exploration permit, section 36-1-140 provided that "location of mineral claims may be made upon unleased mineral lands belonging to the state." We conclude that the selected lands were not "lands belonging to the state" at the time Occidental made its alleged discovery.

Occidental relies on *Wyoming v. United States,* 255 U.S. 489, 41 S. Ct. 393, 65 L. Ed. 742 (1921), for its contention that an equitable interest in the selected lands passed to the state at the moment of selection. In that case, the United States Supreme Court reviewed the nature of the federal/state relationship following the selection of certain indemnity lands by Wyoming. The court concluded:

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5 At the time the board considered Occidental's request, the Secretary of the Interior had taken no action concerning the state's selection of the indemnity lands.

> It is not as if the selection was merely a proposal by the State which the [federal] land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised; — in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then — if they met all the requirements of the congressional proposal, including the directions given by the Secretary — they remain valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract . . . .

255 U.S. at 496-97, 41 S. Ct. at 394-95. *Accord Payne v. New Mexico,* 255 U.S. 367, 41 S. Ct. 333 65 L. Ed. 680 (1921). Occidental asserts that, since section 2-4-401(5), 1B C.R.S. (1980), provides that the term "lands" when used in a statute includes "lands, tenements, and hereditaments, and all rights thereto and all interests therein," the state's equitable interest in the selected lands qualifies these properties as "lands belonging to the state" for the purposes of section 36-1-140. Therefore, according to Occidental, it could locate mineral claims upon the selected lands pursuant to section 36-1-140 and is entitled to an exploration permit.

In *Andrus v. Utah,* 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980), however, the United States Supreme Court concluded that the nature of the federal government's role in the approval of a state's selection of indemnity lands was altered by a combination of congressional legislation and executive withdrawals of federal lands from disposal after *Wyoming v. United States*

was decided. In *Andrus,* the Supreme Court held that he Secretary of the Interior now has broad discretion to decide whether to classify lands as available for indemnity selections by the states. 446 U.S. at 519-20. To reach this conclusion, the court relied on the powers granted to the Secretary of the Interior in section 7 of the Taylor Grazing Act to classify federal lands for various uses,[6] and on the fact of the withdrawal of all federal lands from disposal, prior to classification, by section 1 of the Taylor Grazing Act[7] and subsequent executive orders of the president. 446 U.S. at 511-20, 100 S.Ct. at 1809-13.

The foundation in *Wyoming v. United States* for the conclusion that the state has an equitable interest in selected lands has been undermined by the subsequent legislation and executive action described in *Andrus.* The function of the Secretary of the Interior upon selection is no longer entirely "judicial in its nature," 255 U.S. at 497, 41 S. Ct. at 395, and is no longer restricted to "determining whether an existing privilege conferred by Congress had been lawfully exercised," 255 U.S. at 496, 41 S. Ct. at 394. Rather , the Secretary of the Interior now has broad but as yet

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6 The Taylor Grazing Act was passed by Congress in 1934. 48 Stat. 1269. Section 7 of the Taylor Grazing Act, as amended in 1936, provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lieu, exchange or script [sic] rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws . . . . Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . . 43 U.S.C. § 315f (1982).

7 Section 1 of the Taylor Grazing Act is codified, as amended, as 43 U.S.C. § 315 (1982).

incompletely-defined discretion[8] to withhold federal lands from classification as lands available for indemnity selection by the states. Even assuming that a state's selection of land satisfies all of the criteria for a proper selection of indemnity lands as detailed in 43 U.S.C. §§ 851-852, the Secretary of the Interior in the proper exercise of his discretion can withhold the lands from classification as indemnity lands and deny the selection. *See Andrus v. Utah,* 446 U.S. at 520, 100 S. Ct. at 1813. Therefore, contrary to the situation existing at the time *Wyoming v. United States* was decided, a state now obtains no assurance that it will receive all or any selected indemnity lands until the Secretary of the Interior makes the discretionary classification decision. Until that decision has been made, the state has only an incipient prospect of future ownership of the selected lands, and these properties cannot be considered "lands belonging to the state" within the meaning of section 36-1-140. *See Justheim v. Division of State Lands,* 659 P.2d 1075 (Utah 1983).

In summary, we hold that the lands in question did not belong to the state upon selection and that Occidental could not locate mineral claims on these lands pursuant to section 36-1-140 for this reason. Thus, the board's decision to deny Occidental an exploration permit was proper.

We reverse the judgment of the district court and remand this case to that court with directions to reinstate the board's order denying the exploration permit.

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[8] In *Andrus,* the United States Supreme Court held that it was not an abuse of that discretion for the Secretary to find that indemnity lands selected by Utah were grossly disparate in value, though equal in acreage, to the original school lands granted and to refuse to classify these lands for selection for this reason. The court intimated, however, that the Secretary's discretion is not limited to value comparisons, stating:

> We therefore hold that the 1936 amendment to the Taylor Grazing Act conferred on the Secretary the authority in his discretion to classify lands within a federal grazing district as proper for school indemnity selection. And we find no merit in the argument that the Secretary's "grossly disparate value" policy consitutes an abuse of the broad discretion thus conferred.

446 U.S. at 520, 100 S. Ct. at 1813. The boundaries of that discretion remain unexplicated.

APPENDIX B

IN THE SUPREME COURT STATE OF COLORADO
82SA455

OCCIDENTAL OIL SHALE, INC.,	)	
Plaintiff-Appellee,	)	
v.	)	
STATE BOARD OF LAND COMMISSIONERS OF COLORADO; and ITS MEMBERS, ROWENA ROGERS, WILLIAM H. CLAIRE, and TOMMY NEAL,	)	Appeal from the District Court, City & County of Denver Trial Court No. 79CV7891
Defendants-Appellants.	)	

Upon consideration of the Petition for Rehearing filed by the Plaintiff-Appellee in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition be, and the same hereby is DENIED.

BY THE COURT, EN BANC, JANUARY 14, 1985.

By: /s/ H. GANTZ
Deputy Clerk

APPENDIX C

DISTRICT COURT, COUNTY OF DENVER,
STATE OF COLORADO

Case No. 79CV7891, Courtroom 7
[Signed May 14, 1982]

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

OCCIDENTAL OIL SHALE, INC.,

Plaintiff,

v.

STATE BOARD OF LAND
COMMISSIONERS OF COLORADO
and its members ROWENA ROGERS,
WILLIAM H. CLAIRE, and TOMMY NEAL,

Defendants.

The above-entitled matter having come on for hearing before this Court on April 15, 1982, and the Court having heard the argument of counsel, examined the administrative record, reviewed the briefs submitted by counsel and the authorities relied upon by the parties, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action by the Plaintiff, Occidental Oil Shale, Inc., ("Occidental") for review of a decision by the State Board of Land Commissioners ("Board") denying Occidental's request for a permit to explore certain mineral lands in Rio Blanco County, Colorado.

2. At all relevant times, Colo. Rev. Stat. § 36-1-140 (1973) provided that mineral claims, including claims for oil shale, could be located "upon unleased mineral lands belonging

to the state." Upon satisfaction of certain notice and notification requirements, this statute also provided that a mineral locator could arrange for a permit to explore his mining claims and, thereafter to lease such claims from the Board.

3. In 1980, subsequent to the commencement of this action, Colo. Rev. Stat. § 36-1-140 was amended, providing that such section would thereafter apply to mineral claims other than claims for coal and oil shale.

4. In 1861, the Legislative Assembly of the Territory of Colorado enacted a statute which stated, inter alia, that the term "lands," as used in Colorado statutes, was to be construed to include "lands, tenements, hereditaments, and all rights thereto, and all interests therein." This law was incorporated in the General Laws of the State of Colorado by the First Colorado General Assembly in 1876 and has continuously remained the law in Colorado to this date.

5. On September 4, 1979, the Board, on behalf of the State of Colorado, submitted to the United States Department of Interior, Bureau of Land Management documents identifying 6,840 acres of oil shale lands selected by Colorado ("Selected Lands") as indemnity for certain lands granted to Colorado upon statehood but not received thereby because of deficiencies, claims, reservations, or other disposals by the United States. This selection of indemnity lands by the Board was made pursuant to Art. IX, Section 10 of the Colorado Constitution and 43 U.S.C. § 851, 852.

6. Pursuant to Colo. Rev. Stat. § 36-1-140 (1973), Occidental notified the Board by letter dated September 24, 1979, that Occidental had made a discovery of oil shale and associated minerals after the State's September 4, 1979, selection and had located mineral claims on the Selected Lands pursuant to Colo. Rev. Stat. § 36-1-140 (1973). Occidental included copies of the mining location certificates and requested from the Board a permit to explore the mining claims.

7. Occidental representatives appeared and testified at two Board meetings held, in part, to consider Occidental's request for an exploration permit. These hearings were held on October

1, and October 15, 1979, and the proceedings were set forth in transcripts which were included in the Administrative record. At these hearings, Occidental again requested an exploration permit.

8. At the conclusion of the Board's second meeting on October 15, 1979, the Board voted to deny Occidental's request for an exploration permit on the grounds that the State of Colorado did not yet have legal title to the Selected Lands.

9. Occidental timely sought review of the Board's decision by filing this action on November 9, 1979, pursuant to the State Administrative Procedure Act. Thereafter, the parties stipulated, with Court approval, that they would initially seek a determination of whether mineral locations could be made pursuant to Colo. Rev. Stat. § 36-1-140 (1973), on the Selected Lands.

10. The parties further stipulated that, upon the filing of the selection application by the Board, there was vested in the State the full equitable title to and interest in the selected lands, and that legal title to the lands selected would not vest in the State until the lands were clear listed by the Secretary of Interior.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under Colo. Rev. Stat. § 24-4-106 (1980 Cum. Supp.).

2. When the Board submitted to the Bureau of Land Management documents identifying and selecting the Selected Lands, the State of Colorado acquired equitable title to and interest in the Selected Lands. Legal title to the Selected Lands does not vest in Colorado until approval of the selection by the Secretary of Interior. *Wyoming v. United States,* 255 U.S. 489 (1921); *Payne v. New Mexico,* 225 U.S. 367 (1921).

3. Colo. Rev. Stat. § 36-1-140 was enacted to promote mineral development and permits mineral locations to be made on "lands belonging to the State." Under Colo. Rev. Stat. § 2-4-401(5) the term "lands," as used in § 36-1-140, includes all rights to and all interests in land.

4. As Colorado acquired equitable title to and interest in the Selected Lands upon selection, the Selected Lands were

thereafter "lands belonging to the State," and, therefore, subject to mineral location pursuant to Colo. Rev. Stat. § 36-1-140 (1973).

5. Even without the definition supplied by Colo. Rev. Stat. § 2-4-401(5), Colorado had acquired such an interest in the Selected Lands so as to open such lands to mineral claim locations under Colo. Rev. Stat. § 36-1-140. *See Wyoming v. United States, supra.*

6. The Board erred in denying Occidental's request for an exploration permit on the grounds that the lands did not belong to the State.

JUDGMENT

7. The Board's October 15, 1979, decision to deny Occidental an exploration permit was unlawful and is hereby set aside. This case is remanded to the Board for further proceedings consistent with this decision.

8. This Judgment is limited to the determination that the Selected Lands were open to location pursuant to Colo. Rev. Stat. § 36-1-140 (1973), after selection and at the time that Occidental notified the Board of its locations. All other claims set forth in Occidental's complaint herein are dismissed without prejudice, and may be renewed, if necessary, at a later date.

9. The clerk is directed to promptly enter this judgment pursuant to Rule 58, Colo. R. Civ. P.

DATED this 14th day of May, 1982.

BY THE COURT

By: /s/ ROBERT T. KINGSLEY
District Judge

APPENDIX D

DISTRICT COURT, COUNTY OF DENVER,
STATE OF COLORADO
Case No. 79CV7891, Courtroom 7
[Signed September 14, 1981]

ORDER

OCCIDENTAL OIL SHALE, INC.,

Plaintiff,

v.

STATE BOARD OF LAND COMMISSIONERS OF COLORADO and its members ROWENA ROGERS, WILLIAM H. CLAIRE, and TOMMY NEAL,

Defendants.

THIS MATTER having come before the Honorable Robert T. Kingsley on August 12, 1981, at 9:15 a.m., on Defendants' Motion to Commence Briefing Schedule, filed October 22, 1980, and Plaintiff's Motion to Stay Proceedings, filed November 21, 1980, Plaintiff represented by Daniel R. Hale and Davis, Graham & Stubbs, by David L. Hiller, and Defendants by Assistant Attorneys General Janet L. Miller and Kathleen Bowers, the parties having withdrawn their respective motions, without prejudice, the Court having noted that, by Order of June 24, 1980, this Court, by the Honorable Leonard P. Plank, determined that it will proceed in this action to first decide the issue of whether the subject lands are "lands belonging to" the State under 1973 C.R.S. 36-1-140, and the Court having heard the statements of counsel and being fully advised in the premises,

IT IS ORDERED that:

1. The Court will decide whether the subject lands belong to the State under 1973 C.R.S. 36-1-140 on the basis of the following facts:

A. Upon the filing of the State Board of Land Commissioners' selection application with the Bureau of Land Management on September 4, 1979, there was vested in the State the full equitable title to and interest in the lands selected.

B. Legal title to the lands selected will not vest in the State until the lands are clear-listed by the Secretary of the Interior.

2. The issue now before the Court is therefore whether the absence of legal title alone is determinative of whether the subject lands are "lands belonging to" the State under 1973 C.R.S. 36-1-140.

3. The parties will attempt to resolve the pending questions regarding discovery in this matter, and will inform the Court of their progress on these questions on or before September 18, 1981.

4. The parties will attempt to agree on a briefing schedule in this matter and will report that schedule to the Court on or before September 18, 1981.

DATED AT DENVER, COLORADO this 14th day of September, 1981.

BY THE COURT:

By: /s/ ROBERT T. KINGSLEY
District Judge

The entry of the foregoing
Order is consented to:

DAVIS, GRAHAM & STUBBS

By: /s/ DAVID L. HILLER
#10119
P.O. Box 185
Denver, Colorado 80201
Telephone: (303) 892-9400

Attorneys for Plaintiff

By: /s/ JANET L. MILLER
#5843
Assistant Attorney General
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 839-3611

Attorney for Defendants

APPENDIX E

Commissioners
ROWENA ROGERS
WM. H. CLAIRE
TOMMY NEAL

ANTHONY SABATINI
Administrator
THOMAS E. BAETZ
Minerals Director
ROBERT L. HAPGOOD
Chief Accountant

BOARD OF LAND COMMISSIONERS
Department of Natural Resources
620 Centennial Building
1313 Sherman St., Denver, Coloraodo 80203
(303) 839-3454

October 16, 1979

Occidental Oil Shale, Inc.
5000 Stockdale Highway
Bakersfield, CA 93300

Gentlemen:

On October 15, 1979, representatives of Occidental Oil Shale, Inc. appeared before the State Board of Land Commissioners to request an exploration permit on the 6,840 acres in Rio Blanco County which the Land Board has selected as indemnity acreage.

The advice of the Attorney General to the Land Board is that it does not have full legal title to the property and cannot issue permits or otherwise assume any management responsibility in regard to the selection site.

By formal action the Land Board took unanimous action to affirm a motion to deny Occidental's request for a permit under CRS 36-1-140.

Very sincerely yours,

STATE BOARD OF LAND COMMISSIONERS

Rowena Rogers
President

Commissioners
ROWENA ROGERS
WM. H. CLAIRE
TOMMY NEAL

ANTHONY SABATINI
Administrator
THOMAS E. BAETZ
Minerals Director
ROBERT L. HAPGOOD
Chief Accountant

BOARD OF LAND COMMISSIONERS
Department of Natural Resources
620 Centennial Building
1313 Sherman St., Denver, Colorado 80203
(303) 839-3454

October 22, 1979

Mr. R. J. Fernandes, President
Occidental Oil Shale, Inc.
5000 Stockdale Highway
Bakersfield, CA 93309

Dear Mr. Fernandes:

OCCIDENTAL OIL SHALE CLAIM

The Colorado State Board of Land Commissioners has received your "renewed request" for an exclusive permit to explore certain lands on which the Land Board has recently filed its selection list with the Department of Interior, Bureau of Land Management. According to your letter dated October 17, 1979, this "renewed request" is based on "Additional and Amended Certificates and Relocation Certificates" which allegedly confirm discovery on the subject land.

On October 15, 1979, the Land Board considered and denied Occidental's request for a permit. Prior to this decision, the Board was advised by Occidental that it had made a discovery of oil shale on the land in question. Thus, all relevant information which is contained in Occidental's "renewed request" was before the Board when Occidental's request for a permit was denied.

As you are aware, the Board denied Occidental's request for a permit since the subject land does not "belong" to the state as required by C.R.S. 1973, 36-1-140. Any other issues concerning compliance with this statute were not considered.

In the event that the state becomes owner of the subject land upon approval of its selection list by the Secretary of the Interior, and Occidental files a request for a permit, then the Board will consider the extent of Occidental's compliance with the statute at that time. Until the state is determined to be the owner, the Board lacks authority to act under 36-1-140. For this reason, the permit request, location certificates and claim map submitted by Occidental on September 24, 1979, were returned at the close of the October 15, 1979, meeting.

At the conclusion of this meeting, counsel to the Board, Mrs. Janet M. Clouse, indicated that the Board's action constituted final agency action as that term is used within the Administrative Procedures Act. The Board has no authority whatsoever to reconsider its decision based on information such as that submitted in support of Occidental's "renewed request", which information was presented to the Board before its decision on October 15, 1979.

Accordingly, Occidental's "renewed request" and the "Additional and Amended Certificates and Relocation Certificates" submitted in support thereof are hereby being turned [sic] as well as those documents submitted on September 24, 1979, which were submitted to the Board by your letter of October 17, 1979. The Board took final action on this matter on October 15, 1979.

Sincerely yours,

STATE BOARD OF LAND COMMISSIONERS

Rowena Rogers
President

APPENDIX F

STATUTES INVOLVED:

I. Act of March 3, 1875, § 7, 18 Stat. 474 (the Colorado Enabling Act)

An Act to enable the people of Colorado to form a constitution and state government, and for the admission of the said state into the union on an equal footing with the original states.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

* * * * *

§ 7. School lands. The sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal sub-divisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said state for the support of common schools.

II. 43 U.S.C. § § 851-852 (1982) (indemnity laws)

§ 851. Deficiencies in grants to State by reason of settlements, etc., on designated sections generally.

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation,

or are, before title could pass to the State, otherwise disposed of by the United States: *Provided,* That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: Provided, however, That nothing in this section shall prevent any State from awaiting the extinguishment of any such military, Indian or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

§ 852. Selections to supply deficiencies of school lands.

(a) Restrictions.

The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection.

(4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided, however,* That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved,

the State shall succeed to all the rights of the United States under the lease or permit as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Adjustments.

Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided,* That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Preference rights for State.

Notwithstanding the provisions of section 282 of this title on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than section 282 of this title, or as against equitable claims subject to allowance and confirmation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d) "Unappropriated public lands" defined; determination of mineral character of land.

(1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulfur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purposes of this section of the mineral character of lands lost to a State shall be made as of the date of application for selection and upon the basis of the best evidence available at that time.

§ 852a. Applications for unsurveyed lands; regulations; acreage requirements.

The Secretary of the Interior may issue regulations governing applications for unsurveyed lands. If he establishes any minimum acreage requirements, they shall provide for selection of tracts of reasonable size, taking into consideration location, terrain, and adjacent land ownership and uses.

§ 852b. Survey of lands prior to transfer; time for survey; availability of funds; lands suitable for transfer.

Prior to issuance of an instrument of transfer, lands must be surveyed. The Secretary of the Interior shall within five years, subject to the availability of funds, survey the exterior boundaries of lands approved as suitable for transfer to the State.

III. 43 U.S.C. § § 315, 315f (1982) (Sections 1 and 7 of the Taylor Grazing Act)

§ 315. Grazing districts; establishment; restrictions; prior rights; rights-of-way; hearing and notice; hunting or fishing rights.

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, un-

appropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not appropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided,* That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this subchapter nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this subchapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this subchapter nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 471 of title 16, for the purposes set forth in section 475 of title 16, or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established

until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this subchapter shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

§315f. Homestead entry within district or withdrawn lands; classification; preferences.

The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter, or proper for acquisition in satisfaction of any outstanding lieu [sic], exchange or scrip rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided,* That locations and entries under the mining laws including the Act of February 25, 1920, as amended [30 U.S.C. 181 et seq.], may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided,* That upon the application of any applicant qualified to

make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

IV. Colorado Mineral Location Law; Colo. Rev. Stat. § 36-1-140 (1973)

Mineral locations - posting - lease. Location of mineral claims may be made upon unleased mineral lands belonging to the state. The discoverer of a body of mineral in either a lead, lode, ledge, deposit, vein, or contact shall immediately post conspicuously a notice declaring that he has made such a discovery on the date attached to the notice. Within ten days after posting said notice, the discoverer must notify the state board of land commissioners of said discovery and arrange for a permit to explore the extent of the discovery. Within sixty days from date of discovery, the locator shall be required to take a lease upon such terms as may be agreed upon by the state board of land commissioners, or apply for an extension of the permit.

APPENDIX G

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

October 15, 1981

Instruction Memorandum No. 82-33
Expires 9/30/82

To: SD's

From: Director

Subject: State Indemnity Selections

This memorandum establishes procedures for processing State indemnity selection applications, pending issuance of a revised BLM Manual Section 2621. Existing procedures in BLM Manual Section 2621, Release 2-88 of November 13, 1974, are to be used where they are not in conflict or inconsistent with this memorandum.

Prior to initiating implementation of this guidance, you should discuss the operational aspects with your counterpart State Land Commissioner/Director. Based on these discussions, appropriate modifications may be made for your State specific situations. Copies of this memorandum have been sent under separate cover to each State Land Commissioner/Director.

The policy contained herein is derived primarily from U.S. Supreme Court decision *Andrus v. Utah*, _____ U.S. _____ (No. 78-1522, May 19, 1980), and the expressed interest of the Department and the Bureau to conclude the indemnity selection program as expeditiously as possible.

1. The remaining entitlements of the various States are to be considered as an obligation and debt due the States by the Federal Government.

2. In the application of laws, regulations, and policies for indemnity selections, BLM will consider the equities of the States to the greatest extent possible within the constraints of applicable law.

3. Satisfaction of indemnity selection rights and disposal of parcels of land for that purpose are to be considered as "serving the national interest" in the context of Section 102(a)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA) and in connection with land-use planning and classification activities in the indemnity selection implementation program.

4. For purposes of indemnity selection, Bankhead-Jones lands (Land Utilization Lands (LU)) are public lands and are thus eligible for lieu selection, subject to confirmation by issuance of a formal Solicitor's Opinion.

Background

In *Andrus v. Utah,* the Supreme Court held that the discretionary authority of the Secretary, as delegated to BLM under Section 7 of the Taylor Grazing Act, includes the authority to refuse to classify public lands as suitable for selections where values are in excess of established policy guidelines.

The Supreme Court held that the Secretary may take into account the value of base lands and selected lands in the approval or denial of selections. The Court used the phrase "roughly equivalent value" as a general rule to guide value equities.

The Solicitor has determined that under this rule, States may choose to:

(a) Aggregate, or "pool" base lands;
(b) Select on a tract-for-tract basis; or
(c) Use a combination of 1 and 2.

Thus, a State may, in an application(s), satisfy all or any part of its entitlement by selecting public lands of an aggregate value roughly equivalent to that of the State's offered base lands, as long as the total public land acreage selected does not exceed the State's entitlement. In the alternative, a State may continue to select individual tracts or groups of tracts without the constraint of a tract-for-tract match in acreage of the base and selected lands, but must stay within the value differentials discussed below.

The "roughly equivalent value" guideline clearly implies a range of different values. This range has been interpreted by the Solicitor

to suggest that the value of the selected lands cannot exceed that of the pooled base lands by more than 10 percent, provided however, that where base land is offered on a tract-by-tract basis and a base land tract has a value of less than $500.00 per acre, the public land tract selected may not exceed the base land value by more than 25 percent. Where the value is greater than $500.00 per acre, the public land tract selected may not exceed the base land value by more than 10 percent.

Valuation

Valuation on both base lands and selected lands will be made at approximately the same date, and as near to the proposed date of conveyance as practicable.

The basic policy on valuation will be highest and best use as to both base and selected lands. All pertinent information available from any source may be used to assist in the valuation process. The same valuation methodology will be used for value determinations on both base and selected lands. A market data review approach (i.e., comparable sale values) will be used whenever possible. Other methods (e.g., income approach, estimates of reserves, etc.) will be used where they may serve to provide useful information. The value of base lands will not be considered to be adversely affected by any current use restrictions, the policy being highest and best use. In particular, base lands are to be valued on this basis without regard to any constraints arising from uses to which the lands lost to the States have been subsequently placed.

No formal appraisals are required. However, it is the responsibility of the BLM field office to assure that valuations completed within the scope of these guidelines fall within the acceptable margin of differences as defined above.

Mineral in Character

State base lands must be found to be "mineral-in-character" to qualify a State to select public lands which are mineral-in-character. Base lands classified by Geological Survey (GS) as "prospectively valuable" or "valuable" for leasable minerals (i.e., oil shale, oil and gas, geothermal, etc.) will be regarded by the BLM to be mineral-in-character for purposes of State selections. The Bureau

will continue to make determinations as to whether lands are mineral-in-character with respect to hardrock minerals, while mineral-in-character determinations involving leasable minerals will be made by the GS.

The Bureau will use any type of feasible and acceptable methodology (e.g., physical field investigation, geologic inference, etc.) for determining the mineral character classification of base lands and selected lands. Drilling or excavation programs for assessing mineral resource potential and for establishing mineral-in-character classifications are not required for either the base or public lands. Such programs will not be undertaken by the Federal Government on either base or selected lands, and State Governments will not be required to undertake such programs on base lands. As provided by law, mineral-in-character determinations of base lands will be made as of the date of selection application. State personnel will be encouraged to participate in mineral-in-character determinations and both the State and the GS will be requested to participate in the mineral valuation process.

Other Requirements

With respect to specific Federal requirements (e.g., civil rights, floodplains, cultural resources, etc.), the Bureau will consider including, where applicable, guidance and stipulations, some of which may attach to and run with the land. Such consideration should include conditions or stipulations which would obligate the States on mitigation, assurance, and compliance. Agreements (i.e., Memoranda of Understanding between BLM and State Historical Preservation Officers on Cultural-Historic Resources) should also be considered. The applicability of Title VI of the Civil Rights Act of 1964 and the regulations of 43 CFR Part 17, is currently being litigated and further advice on the resolution of this matter will be provided at a later date.

The Mutual Covenants and Agreements section of the Memorandum of Understanding Between the Western States Land Commissioners Association and the BLM, dated January 8, 1981, also contains guideline information on policy objectives. Copies of these items are included as Enclosure 1.

Adjudication Procedures

The following preliminary adjudication procedures are to be used as general guidance to complete the State Indemnity Selection program. In cases where both the State and BLM State Office can work out procedures that are more suitable to both parties, such revised procedures should be used. In exceptional cases, Headquarters Office is to be advised in writing of revised procedures. The State and the BLM must be willing to commit themselves to working out the program on a cooperative, negotiated basis, as opposed to an adversary type of proceeding.

Prior to filing of formal application by the State, the BLM State Office, in conjunction with the State, should:

A. Discuss program concept, policy requirements, procedural guidelines and expediting modifications, program schedule and priorities, budgetary requirements, necessity for supplemental memorandums of understanding to the master MOU with Western States Land Commissioners Association (WSLCA). (Refer to Instruction Memorandum No. 81-200.)

B. Verify validity of acreage entitlement, including mineral and non-mineral character types of base, where known. Reach agreement with State on validity of base entitlement and/or alternatives to resolve questions on invalid/excess base. (See Enclosure 2 as to deficiencies computation.)

C. Identify public lands suitable and available for transfer to the State. Lands meeting this criteria must meet Management Framework Plan (MFP) conformance guidelines established in Instruction Memorandum No. 81-156 (Enclosure 3).

D. Identify lands unsuitable for transfer to the State and either negotiate withdrawal of State request and/or issue letter of explanation as to reason for nonapproval of proposed selection.

E. Identify lands with conflicts — mining claim locations, cultural resources, etc. — that may delay transfer until the conflicts are resolved.

F. Identify those withdrawn lands which the State(s) are interested in selecting. Where States wish to select such land and the lands are not being used for the withdrawal purpose, negotiate

with holding agency for revocation. If continued withdrawal is justified, explain justification to State and agree/consult on an appropriate course of further action.

G. Review any list of public lands presently classified as suitable for indemnity selection to determine if there are lands the State may want to select. If so, reserve lands for subsequent application by State after obtaining commitment or positive indication of interest from the State.

Petition-Application Procedures

State Selection Petition-Application Received at State Office:

A. Serialize case,

B. Validate base lands of formal application, and

C. Following validation, accept petition for classification.

NOTE: *Segregative Effect* — Under 43 CFR 2621, the filing of a State indemnity selection immediately segregates the public lands selected from all forms of appropriation under the public lands laws; therefore, such applications are to be noted to the public land records within 3 working days after receipt of an application.

Land Classification Procedures

A. Proposed Classification decision (use 43 CFR 2400 procedures) (For example, see Enclosure 4).

B. Scoping Process — should address all of the following:

   1. Identify problems and issues,

   2. Determine the type and need for public involvement,

   3. Specify the level of detail of the environmental assessment required, and

   4. Describe the consistency with land-use plans (refer to Instruction Memorandum No. 81-156, included as Enclosure 3).

C. Environmental Assessment — Land Reports — Classification Decisions

   1. In situations where no significant problems or issues

are developed in the scoping process, prepare:

(a) Finding of No Significant Impact (FONSI) and land report (refer to BLM Manual Section 2063); and

(b) Issue Initial classification decision (use 43 CFR 2400 procedures). Identify *all* reservations and stipulations that will be included in clearlist. (For example, see Enclosure 5).

2. In situations where significant problems or issues are developed in the scoping process, prepare:

(a) Environmental assessment and land report (use BLM Manual Section 2063); and

(b) Issue initial classification decision (use 43 CFR 2400 procedures), either cancelling or approving the proposed classification in whole or part. If any part is approved, identify *all* reservations and stipulations that will go into clearlist.

D. During or at the conclusion of land classification process:

1. Identify all public lands *approvable* for transfer to the State. *Include* reservations and stipulations and *include* any access reservations where transfer will block existing access to other public lands.

2. Identify the public land acreage which is mineral-in-character and which will require State base lands to be offered which are mineral-in-character. (Note: If nonmineral base and selected public land of nonmineral character are involved, follow same procedure except as to nonmineral standards.)

3. Identify dollar values committed.

4. Negotiate with the State for withdrawal or denial of applications where appropriate, or additions of lands to applications.

5. Identify lands with conflicts to be resolved before classification and clearlist can be completed.

Adjudication — Valuation Procedures

Adjudication personnel and appraisers, in cooperation with the State, will, for:

Base Lands

A. Compare State and Bureau records of used and available entitlement acreage and reach agreement with the State on acreage and location of State base lands.

B. Obtain GS reports on all State base lands, and with aid of BLM mineral personnel, identify character (i.e., mineral or nonmineral character) of base lands. Reach agreement with the State on these determinations.

C. Prepare valuation estimates for base lands by geographic area and/or specific lands. Reach agreement with the State on these valuation estimates.

The objective of Steps A., B., and C., above, is to develop information that will enable the State and BLM to agree on the estimated values and mineral character of the base lands. This will permit the State to adjust the base lands in each block or specific tract application(s) in order to meet value and mineral character requirements prior to clearlisting.

Selected Lands

A. Review valuations of selected public lands as petition-applications and/or applications are filed, and reach agreement with the State on the value estimates.

B. Check land status on selection applications as filed and/or as negotiated with the State.

C. Obtain U.S. Geological Survey reports on selected public lands as petition-applications are filed, or in advance of selections where areas to be selected are known.

Adjudication — Clearlist Procedures

A. Appropriate office will determine:

1. Whether clearlist lands have been or will be classified;

2. Amount of acreage that has been determined to be mineral in character; and

3. Reservations, terms, conditions, etc., to be included in clearlists.

B. Appropriate office notifies State of:

1. Value of State's base land for individual selection, and

2. Acreage of lands determined to be mineral in character.

C. State revises application(s) to substitute base lands acreages as necessary to equalize the acreage of mineral base, and to insure that the base and selected land values do not exceed the value differentials outlined under the pooling and tract-for-tract concepts.

Note: Acreages of State base lands and selected public lands in each clearlist will not necessarily balance due to (a) being within the percent differential, (b) being within the 25 percent differential option, or (c) combination of (a) and (b). The State may elect to increase base lands acreages of sufficient total value to select less acreage of public lands with higher value, providing the total values (of base and selected) are equal, or are within the acceptable value range differential. Each clearlist case file must contain a value certification for both base and selected lands.

D. After base land adjustments are completed and meet the value standards (i.e., a roughly equivalent 10 percent or 25 percent differential), final clearlisting procedures will be completed, including: publication; disposition of protests, if any; notation of school lands cards, serial register page, Historical Index, Master Title and Use Plats; and signature of BLM official on clearlist.

E. Clearlist delivered/transmitted to State.

By: /s/ Ed Hastey
Associate Director